IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1095

THE CONTINENTAL INSURANCE COMPANY,
Petitioner,

vs.

GEORGE A. BYRNE, DEPUTY COMMISSIONER, TENTH COMPENSATION DISTRICT, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, The Continental Insurance Company, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 3, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals, rendered on January 3, 1972, has not yet been reported and is reprinted as Appendix C. The opinion of the United States District Court for the Northern District of Illinois, Eastern Divi-

sion, rendered on September 29, 1970, was unreported and is reprinted as Appendix B. The Compensation Order and Award of Compensation entered on November 10, 1969 by the respondent Deputy Commissioner is reprinted as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 3, 1972. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

Whether the statutory presumption of compensability under § 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 920(a), should be applied by either the Deputy Commissioner or a reviewing court in a case where the employer has produced substantial evidence to the contrary showing that the injury in question did not arise out of and in the course of employment, and no evidence regarding this issue was produced on behalf of the claimant.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are Sections 2, 20 and 21 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 and 1436, 33 U. S. C. §§ 902, 920 and 921; and Section 10(e) of the Adminstrative Procedure Act, 80 Stat. 393, 5 U. S. C. 706(2)(E); which provide in pertinent part as follows:

§ 902. **Definitions.**

When used in this chapter—

. . . .

(2) The term "injury" means accidental injury or death arising out of and in the course of employment. . . .

§ 920. **Presumptions.**

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

§ 921. **Review of compensation orders.**

. . . .

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred. . . .

§ 706. **Scope of review.**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

. . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . .

STATEMENT OF THE CASE.

On October 17, 1969, longshoreman Frank Grayson filed a claim with the respondent Deputy Commissioner for compensation pursuant to the provision of the Longshoremen's and Harbor Worker's Compensation Act on account of injuries sustained aboard a vessel on September 24, 1969. The petitioner thereafter advised the Deputy Commissioner that the claim would be controverted on the grounds that any injuries suffered by Grayson did not arise out of and in the course of his employment with its insured, Federal Marine Terminals, as required by § 2 of the Act.

The Deputy Commissioner held hearings on the claim on October 20 and 24, 1969. At the first hearing, Grayson testified that he was injured when he fell through an open hatch. He stated that he had been working in the middle or 'tween deck of the vessel's No. 2 cargo hold and left to go to the washroom. Grayson further testified that he could remember nothing from the time he started up the ladder to leave the No. 2 'tween deck until he was found injured at the bottom of the No. 1 cargo hold.

At the second hearing, the petitioner presented the testimony of Grayson's foreman, the terminal manager, and three others familiar with the vessel. They testified that no one was assigned to work in any part of the No. 1 hold and that it was impossible to pass directly from the No. 2 hold to the No. 1 hold. The only way to get from the No. 2 'tween deck to the No. 1 hold was to climb 16 feet up a ladder to the main deck, cross over to a second ladder, and then climb 16 feet down the No. 1 'tween deck. It was impossible to fall from the second ladder to the bottom of the No. 1 hold where Grayson was found because the floor of the No. 1 'tween deck extended at least

10 feet beyond the base of the ladder. The petitioner's witnesses also testified that it was impossible to mistake the ladder in the No. 1 hold for the ladder in the No. 2 hold because the No. 1 hold was covered and completely dark at the time of the accident, while the No. 2 hold was open and in broad daylight.

On November 10, 1969, the Deputy Commissioner made an award and entered a compensation order which allowed Grayson's claim and ordered the payment of compensation [Appendix A]. The Deputy Commissioner's basic finding of fact was the following:

> 6. The injury arose out of and in the course of employment. The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred.

Petitioner thereafter brought this action pursuant to § 21(b) of the Act, 33 U. S. C. § 921(b), to set aside the compensation order issued by the Deputy Commissioner. On cross motions for summary judgment, the District Court held that the Deputy Commissioner's finding that Grayson's injury arose out of and in the course of his employment was not supported by substantial evidence and vacated the award [Appendix B].

The Deputy Commissioner appealed. The Court of Appeals reversed and remanded on the grounds that judicial review of the Deputy Commissioner's findings is limited by the presumption stated in § 20(a) of the Act and that the evidence presented by the petitioner was not sufficient to overcome that presumption [Appendix C].

REASONS FOR GRANTING THE WRIT.

This case presents an important question of the interpretation of a key provision of the Longshoremen's and Harbor Workers' Compensation Act, the statute which

governs the compensation rights of thousands of maritime workers, certain government employees and employees of government contractors,[1] and workers in the District of Columbia.[2] Section 20(a) provides that it shall be presumed, in the absence of substantial evidence to the contrary, that a claim comes within the provisions of the Act.

The meaning and effect of the presumption stated in § 20(a) of the Act were clearly defined by this Court in *Del Vecchio* v. *Bowers*, 296 U. S. 280 (1935):

> The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this *prima facies*. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence [296 U. S. at 286, citations omitted].

(a) The Decision Below Is in Conflict with Prior Decisions of this Court.

In this case, the Court of Appeals for the Seventh Circuit has held, in effect, that the presumption of § 20(a) has the character of evidence in favor of the claimant:

---

1. See 5 U. S. C. § 8171; 42 U. S. C. § 1651 and § 1701.
2. See 45 Stat. 600 (1928).

> We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability [A19].

The Court of Appeals also indicated that judicial review of the Deputy Commissioner's decision is somehow "limited" by the presumption of § 20(a) [A21]. Thus, the holding of the Seventh Circuit that the Act presumes compensability where there are doubtful factual questions and that judicial review is "limited" by the presumption of § 20(a) is clearly contrary to the interpretation given by this Court in *Del Vecchio v. Bowers*.

(b) The Decision Below Is in Conflict with Decisions of Other Courts of Appeals.

In *John W. McGrath Corp. v. Hughes*, 264 F. 2d 314, 317 (2d Cir. 1959), the Court of Appeals for the Second Circuit rejected the Deputy Commissioner's contention that the § 20(a) presumption had the character of independent affirmative evidence:

> We cannot, as defendants seem to urge, consider the presumption in the Longshoremen's Act, as having here the quality of independent affirmative evidence. We believe that plaintiffs offered sufficient proof to rebut that presumption and consequently it must fall out of the case. It cannot be weighed with defendants' evidence against plaintiffs' since "[i]ts only office is to control the result where there is an entire lack of competent evidence" [264 F. 2d. at 317, citations omitted].

In *Travelers Insurance Co. v. Belair*, 412 F. 2d 297, 301 (1st Cir. 1969), the Court of Appeals for the First Circuit also rejected the Deputy Commissioner's assertion that the § 20(a) presumption governs a case even after evidence has been produced by the employer.

> The government . . . seems to believe that where evidence against the claimant is equally substantial and undisputed the Commissioner could disregard it by an explicit or implicit finding of insubstantiality on the basis of the presumption. This is not the law. . . . Once the employer has satisified his burden of going forward, either in the course of his or the claimant's case, the presumption falls. . . . We then apply the substantial evidence test to the record as a whole without reference to the presumption [412 F. 2d at 301, citations omitted].

Thus, the opinion of the Seventh Circuit in this case is contrary to the opinions of the Courts of Appeals for the First and Second Circuits on this important issue of statutory construction.

(c) This Case Presents an Important Issue Concerning the Administration of a Significant Federal Statute.

As indicated above, the Longshoremen's and Harbor Workers' Compensation Act governs the compensation rights of hundreds of thousands of American workers. The interpretation of § 20(a) is crucial to the proper administration of the Act because the construction advanced by the Bureau of Employees' Compensation in *McGrath* and *Travelers* and adopted by the Seventh Circuit in the instant case effectively denies judicial review of the Deputy Commissioner's findings.

It is not contested that only the Deputy Commissioner may weigh conflicting evidence, and that his decision as to the weight of that evidence may not be disturbed by a reviewing court. However, if the statutory presumption can assume the character of evidence which may itself be weighed against the employer's evidence by the Deputy Commissioner, then a reviewing court can never displace the Deputy Commissioner's findings. If the presumption

counts as evidence for the claimant, then any judicial review on the issue of substantial evidence can successfully be defended by the Deputy Commissioner, who is the only one permitted to weigh the evidence.

The result of this erroneous application of the § 20(a) presumption is fully illustrated by the facts of the instant case, where the District Court properly considered the case without reference to the presumption and found that the award was unsupported by substantial evidence[3] [A11]. There can be no question that the petitioner met its burden of going forward with the evidence and eliminated the statutory presumption by presenting the uncontradicted testimony of witnesses who had personal knowledge of Grayson's work and the area of the accident. Therefore, as prescribed in *Del Vecchio*, this matter should have been reviewed on the record as a whole without reference to any presumption.

Although the Seventh Circuit acknowledged that the Deputy Commissioner's decision must be based on substantial evidence, it failed to find expressly that Grayson's testimony constituted substantial evidence that his injury arose out of and in the course of his employment. Nor did the court find that the petitioner's evidence that Grayson's injury could not have been an accident was so insubstantial that it failed to dispel the § 20(a) presumption. Instead of ruling on the issues of substantial evidence presented by this appeal, the Seventh Circuit abdicated its duty of judicial review by finding the presumption sufficient to sustain the award.

It bears repeating that the § 20(a) presumption is relevant upon judicial review only if the court has determined that the employer's evidence against the claimant is wholly

3. See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 477 (1951).

insubstantial. Otherwise, the presumption has "dropped out" of the case and should not be considered. But once the court accepts the position of the Bureau of Employees' Compensation that the presumption must be considered by a reviewing court, then the Deputy Commissioner cannot lose.

CONCLUSION.

This petition for certiorari should be granted so that this Court may reaffirm the proper construction of § 20(a) of the Longshoremen's and Harbor Workers' Compensation Act as set forth in *Del Vecchio v. Bowers* and may correct the erroneous interpretation of this fundamental statutory provision which has been adopted by the agency charged with administration of the Act.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION.
Tenth Compensation District.

In the Matter of Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 et seq.

FRANK GRAYSON,
Employee,
vs.
FEDERAL MARINE TERMINALS, INC.,
Employer,
and
THE CONTINENTAL INSURANCE COMPANY,
Insurance Carrier.

Case No. 10-1921

COMPENSATION ORDER
AWARD OF COMPENSATION.

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with the law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. On September 24, 1969, Frank Grayson, hereinafter referred to as the "employee" or the "claimant," was in the employ of Federal Marine Terminals, Inc., in the Tenth Compensation District, established under the provisions of

the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 et seq.

2. The liability of the employer for compensation under the said Act was insured by The Continental Insurance Company.

3. On said date, the employee herein, while performing service for the employer as a longshoreman aboard the M/V *Kostantis Yemelos*, afloat upon the navigable waters of the United States, sustained personal injury, resulting in his disability, when he fell from the tween deck into the lower hold of the ship, some 24½ feet below.

4. As a consequence of such injury the employee suffered a fracture of the left elbow, a perilunate dislocation of the left wrist, and a comminuted fracture of the left femur in the chanteric and subtrochanteric regions, requiring immediate surgical procedures to reduce the dislocations and place femur in traction.

5. The employer and the employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of injury.

6. The injury arose out of and in the course of employment. The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred.

7. Written notice of the injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice.

8. The employer did not furnish the employee with medical treatment, etc., in accordance with the provisions of section 7(a) of the Act, 33 U. S. C. 907(a), but the employee obtained necessary medical and hospital care at the South Chicago Community Hospital, for which the employer and the insurance carrier are liable for the reasonable cost thereof.

9. The average weekly earnings of the claimant at the time of injury were in excess of $105.00.

10. As a result of the injury the claimant was wholly disabled from September 25, 1969 to November 7, 1969, inclusive, and continuing, and for such period of temporary total disability he is entitled to 6 2/7 weeks' compensation (through November 7, 1969) at $70.00 per week, in the amount of $440.00.

11. The employer and the insurance carrier have paid nothing to the claimant as compensation.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD

The employer, Federal Marine Terminals, Inc., and the insurance carrier, The Continental Insurance Company, shall pay to the claimant herein compensation as follows: For temporary total disability, 6 2/7 weeks' compensation at the rate of $70.00 per week from September 25, 1969 to November 7, 1969, inclusive, in the amount of $440.00, and continuing thereafter at the same rato during such time as the employee shall be temporarily and totally disabled as a result of the injury, subject to the limitations of the Act or further order of the Deputy Commissioner. The employer and the insurance carrier shall also pay reasonable medical and hospital expenses the claimant has incurred as a result of the injury.

Given under my hand and filed at Chicago, Illinois, this 10th day of November, 1969.

/s/ GEORGE A. BYRNE,
George A. Byrne,
Deputy Commissioner.

APPENDIX B.

UNITED STATES DISTRICT COURT

Northern District of Illinois, Eastern Division

THE CONTINENTAL INSURANCE COMPANY, *Plaintiff*, *vs.* GEORGE A. BYRNE, Deputy Commissioner, Tenth Compensation District, Bureau of Employees' Compensation, United States Department of Labor, *Defendant*.	No. 69 C 2516

MEMORANDUM AND OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This is an action for review of a compensation award made pursuant to the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 901 *et seq.* The defendant, George A. Byrne, Deputy Commissioner of Labor, granted the award in favor of one Frank Grayson against Federal Marine Terminals, Inc. The Continental Insurance Company, the plaintiff herein, was the insurance carrier for Federal Marine Terminals at all times relevant to this action. The parties have filed cross motions for summary judgment. For the reasons set forth below, this court is of the opinion that judgment should be rendered in favor of the plaintiff and, further, that the compensation award made by the defendant should be vacated.

The award in question arose out of an accident allegedly sustained by Grayson while he was employed by the plaintiff's insured. On the afternoon of September 24, 1969, Grayson was working as a longshoreman moving cargo on the 'tween (between) deck of the Number 2 cargo hold aboard the Greek vessel "Kostantis Yemelos," which was berthed at the Federal Marine dock in Chicago, Illinois. At approximately 3:30 P. M., Grayson was discovered lying on the lowest deck of the Number 1 cargo hold of the vessel. He was taken to South Chicago Community Hospital, where he underwent surgery and treatment for fractures of his left elbow and femur, as well as dislocations of his left wrist and femur.

On October 17, 1969, Grayson filed the claim in issue with the Bureau of Employees' Compensation (United States Department of Labor). His claim asserted that he was entitled to compensation pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act for the injuries described above. His signed statement described the accident as follows:

> "... attempted to come off ship hold where working & went (sic) out the wrong way & fell where there were no hatch covers."[1]

During the administrative proceedings here under review, the plaintiff herein contested Grayson's claim on the ground that any injuries he suffered did not arise out of and in the course of his employment with Federal Marine Terminals, as required by Section 2 (2) of the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 902 (2). On November 10, 1969, the defendant made an award and entered a compensation order allowing Gray-

1. Complaint, Exhibit C.

son's claim. The defendant made the following finding of fact which is the primary subject of this review:

> "6. The injury arose out of and in the course of employment. The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred."[2]

The Hearing and Evidence

The hearing upon Grayson's claim was conducted by the defendant in two sessions. On October 20, 1969, Grayson's testimony on his own behalf was taken at the South Chicago Community Hospital. Grayson was represented by Harrison Tyler, President of Local 19, International Longshoremen's Association, and by Robert Ellott,[3] a representative of that union. Grayson's testimony indicated that he was a longshoreman of ten year's experience; that he was working with a crew of seven other men on the afternoon in question; that the crew was working in the Number 2 cargo hold on the deck between the upper and lower decks, i.e., the 'tween deck; that the hatch cover of the upper deck was opened so that cargo could be lifted out of the hold with a crane; and that daylight flooded the area where the crew was working due to the fact that the hatch cover of the upper deck was opened. Grayson further testified that he told his fellow crew members that he had to go to the washroom. At first, during cross-examination Grayson could not remember what happened after he left his worksite or even the route he took in exiting from his worksite. However, upon prompting by the defendant herein, Grayson was able to recall that he had climbed up the ladder from the

2. Complaint, Exhibit D.

3. In the official transcript of the subsequent proceeding, this name is spelled "Ellett."

'tween deck of the Number 1 cargo hold[4] to the upper deck (approximately 12 to 16 feet by his testimony) in order to go to the washroom.[5] He could not remember if he ever arrived at the washroom, or how or why he happened to enter the Number 1 cargo hold where he was found injured on the lower deck.

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4. All other witnesses testified that the crew was working in the Number 2 cargo hold.

5. Following is the relevant excerpt from the official transcript:

"Q. (by Hubert Merrick for the employer and insurance carrier) Now, tell us what happened then. You say you left to go to the washroom, is that right?

"A. (by Grayson) Right.

"Q. How did you go?

"A. Well, I tell—my mind, actually, at that particular point went completely blank until later. I couldn't recognize exactly what happened.

"The Deputy Commissioner (the defendant herein): Well, let me—wait now. Let's go back—

"Mr. Merrick: I will object and move to strike this. Does he know what happened or can he answer it or can't he?

"The Deputy Commissioner: Let us stop. You left the number one hold, where you were working, to go to the washroom?

"The Witness: Right, sir.

"The Deputy Commissioner: Did you go up on the main deck—

"The Witness: Well—

"The Deputy Commissioner: —to go to the washroom?

"The Witness: To my recollection, I had to go so fast, until—I don't remember exactly which direction I went because the ladders, they were both—

"*The Deputy Commissioner: Apparently you did go up on deck?*

"*The Witness: Yes.*

"*The Deputy Commissioner: In order to go to the washroom?*

"*The Witness: Yes.*

"The Deputy Commissioner: All right.

"Mr. Merrick: Q. And did you go to the washroom?

"A. I don't remember. The next thing I remember, they said, 'A man is in the hold, pull him out. He fell to the bottom.' I don't never remember getting to the washroom.

"Q. And you don't remember anything after starting up the ladder to the washroom, is that right?

"A. No. I just started up the ladder and that was the

The second session of the hearing was held on October 24, 1969.[6] Grayson was again represented by Ellett, but the president of the Longshoremen's union, Harrison Tyler, appeared at this session as the only other witness on Grayson's behalf. Although Tyler admitted not having any direct knowledge of the claim in issue, the defendant permitted him to testify concerning the union's contention that an employer is the absolute insurer of its employees during working hours.[7] The testimony of Grayson and Tyler was the only evidence presented in support of Grayson's claim.

The plaintiff first called the foreman of Grayson's crew, Jerry Ross, to testify. His testimony is uncontroverted. He stated that on the day in question, his crew was working in the Number 2 cargo hold. No one was working in the Number 1 cargo hold where Grayson was found. He further testified that the hatch cover over the Number 1 cargo hold was closed, so that the hold was in complete darkness. There was no direct connection between the Number 1 and Number 2 cargo holds. Grayson could get from one hold to the other only by climbing the ladder out of the Number 2 hold onto the main or upper deck, then walking approximately eight feet to the manhole and ladder descending into the Number 1 hold. Ross examined the

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next th[illegible] I remember is that a man have fell in the hold so br[illegible] crane and pull him out. I don't even remember falling or anything." Proceedings, October 20, 1969, pp. 9-10. (Emphasis supplied.)

6. At the beginning of the second session, the defendant announced that the information he had in the claimant's file showed, *inter alia*: that his injury arose out of and in the course of employment. The source, basis, or nature of his "information" does not appear in the record.

7. The union's position is, of course, in conflict with the express terms of the Longshoremen's and Harbor Workers' Act which provide that injuries are compensable only if they arise out of and in the course of the employment relationship. 33 U. S. C. § 902 (2).

premises immediately following the accident. The ladder from the upper deck to the 'tween deck was approximately nine feet in height. The distance between the foot of the ladder on the 'tween deck and the opening through which Grayson fell to the lower deck was approximately eight or ten feet at the closest point. Ross also testified that the washroom was in the men's dressing room on the dock, so that Grayson would have to leave the ship to use its facilities. Finally, Ross stated that he did not think it was possible to go down the ladder into the complete darkness of Number 1 cargo hold without noticing that the hatch cover overhead was closed.

The plaintiff next called Dessie Bond, another foreman at Federal Marine Terminal, to testify. His testimony is uncontradicted. On the afternoon in question, he was working on deck at the Number 4 hatch when he was told that someone had fallen into the hold. He watched while a mate uncovered the hatch over the Number 1 cargo hold. He saw Grayson lying on the lower deck of that hold. No one was assigned to work in the Number 1 hold on that particular day. Bond was later present when the hatch cover over the Number 1 hold was closed. He went down the ladder onto the 'tween deck which he said was "completely dark." He further stated that it was not possible to go directly down the ladder from the main deck to the lower deck where Grayson was found. The opening to the lower deck was approximately six to ten feet from the base of the ladder on the 'tween deck. Finally, he stated that it was not possible to mistake the completely dark Number 1 hold for the sunlit Number 2 hold. Nor was it possible to fall from the ladder between the main and 'tween decks directly into the lower hold.

The plaintiff then called Gerry Horton, a marine surveyor who took the measurements of the Number 1 and 2 cargo holds on the same afternoon Grayson fell. His testi-

mony is uncontradicted. He stated that a masthouse is located between the manholes into the Number 1 and 2 holds, and that the manholes were approximately six feet apart. The ladder between the main and 'tween decks of the Number 1 hold measured 16 feet. The distance between the foot of the ladder on the 'tween deck and the opening into the lower hold was approximately 10 feet.

Horton testified that he was in the Number 1 hold when the hatch cover was closed. He observed "complete darkness." He did not think it possible to fall from the manhole ladder into the lower hold. He further stated that there was not a washroom "in that particular area." He observed that the cargo in the 'tween and lower decks had been torn open, fully exposed, and possibly pilfered. However, he did not observe any of the cargo on Grayson's person when he was removed from the lower hold.

Alfred Hudson, the terminal manager for Federal Marine Terminals, testified that he first became aware of the occurrence in question at approximately 3:15 P. M. He arrived at the dock just as Grayson was brought ashore. He then inspected the Number 1 hold. He testified that it was impossible to fall down directly from the manhole of the Number 1 hold into the lower hold because the 'tween deck adjoined the area surrounding the base of the ladder. Hudson was in the 'tween deck when the hatch cover over the Number 1 hold was replaced. He observed "total darkness." He also went down into the Number 2 hold where he observed daylight when he looked down into the manhole. He stated that although Number 1 and 2 manholes had similar exteriors, upon entry into each manhole a difference was immediately apparent since the Number 1 hold was completely dark while the Number 2 hold was light.

Hudson had observed Grayson working at Federal Marine Terminals five or six times previously during the year

1969. The washroom facilities used by most of the men were located adjacent to the locker room facilities. In an emergency, shipboard facilities could be used.

The final witness for the plaintiff was William Forrester, a photographer. He authenticated a number of photographs of the vessel which were admitted into evidence. None of these photographs were submitted to this court.

The Substantial Evidence Test

It is this court's statutory duty to sustain the compensation award made by the defendant only if his findings are supported by substantial evidence. 5 U. S. C. § 706 (E). "Substantial evidence" connotes a standard based upon the reasonableness of a commissioner's action in view of the evidence before him. *United States* v. *Bianchi & Co.*, 373 U. S. 709, 715 (1963). As stated in *Gooding* v. *Willard*, 209 F. 2d 913, 916 (2nd Cir. 1954):

> ". . .'substantial evidence' means more than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of fact to give it credence and weight essential to support findings. It must have those characteristics to such an extent that in the setting made by the entire record the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord."

See also Universal Camera Corp. v. *National Labor Relations Board*, 340 U. S. 474 (1950).

Applying this standard, the defendant's Finding 6, i.e., that Grayson's injury arose out of and in the course of his employment while he was looking for a washroom, is unsupported by substantial evidence. Grayson's unauthorized presence in the Number 1 hold was unexplained, even by Grayson himself. His own testimony and claim were ambiguous. His claim stated that he was injured while he

was attempting to leave the ship and went out the "wrong way." The testimony of all the witnesses familiar with the vessel indicated that it would be *impossible* to exit from the Number 2 cargo hold via the Number 1 hold. At the hearing, Grayson claimed that his mind went "blank" concerning what happened after he told his co-workers he was going to the washroom, although his memory returned immediately after falling into the lower deck of the Number 1 hold. He could not remember whether he ever actually went to the washroom. Only upon prompting by the defendant to the effect that he "apparently" had gone up on the main deck after leaving the Number 2 hold "to look for a washroom" did he remember doing so. He did not testify that he went into the Number 1 hold to look for a washroom, or for any other purpose.[8] The witnesses familiar with the vessel all testified that a person entering the Number 1 hold would immediately be plunged into darkness. Daylight was streaming into the Number 2 hold where cargo was being unloaded with a crane through the open overhead hatch. No one was working in the Number 1 hold, in contrast with the activity in the Number 2 hold. All these witnesses also testified that the opening through which Grayson fell on the 'tween deck of the Number 1 hold was some distance from the foot of the ladder, making a fall directly from the ladder into the lower hold impossible. In view of the uncontradicted testimony before the defendant, his conclusion that Grayson, an experienced longshoreman, was looking for a washroom is highly speculative, and is not supported by *any* evidence in the record, including Grayson's own testimony. No evidence was presented which connected Grayson's injury with his work. Based upon the evidence before the defendant, Grayson's

8. The defendant's confusion and speculations concerning how and why Grayson arrived at the scene of his injury are reflected in the record. *E.g.*, Proceedings October 24, 1969, pp. 21-22, 24.

employment could not reasonably be said to create the "zone of special danger" out of which his injury arose. *Wolff* v. *Britton*, 328 F. 2d 181, 185 (D. C. Cir. 1964). This court concludes that the defendant's Finding 6 and, consequently, the compensation award to Grayson were clearly not supported by substantial evidence. Because of the dispositive nature of this ruling, the court need not rule upon the other contentions raised by the plaintiff.

The court notes that the plaintiff has submitted and discussed certain evidentiary matters in its briefs which were not before the defendant during the proceedings in question, i.e., Grayson's deposition testimony in another case and a diagram of the relevant area of the vessel. Although a motion to strike these items was not made, the defendant's reply brief correctly asserts that it is improper to introduce evidence outside the record under review. The court therefore disregarded this evidence, and based its decision solely upon a review of the evidence of record which was before the defendant.

It is therefore ordered that summary judgment be, and it is hereby granted in favor of the plaintiff.

It is further ordered that the compensation award be, and it is hereby vacated, and the cause is dismissed.

/s/ EDWIN A. ROBSON,
Chief Judge.

September 29, 1970.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1971 — September Session, 1971

No. 71-1143

THE CONTINENTAL INSURANCE COMPANY,
Plaintiff-Appellee,

vs.

GEORGE A. BYRNE, Deputy Commissioner, Tenth Compensation District, Bureau of Employees' Compensation, United States Department of Labor,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 69 C 2516

EDWIN A. ROBSON, *Judge.*

January 3, 1972

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

SWYGERT, *Chief Judge*. This is an appeal from a judgment vacating an award of compensation under the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. §§ 901, *et seq.* The claimant, a longshoreman working aboard the vessel *Kostantis Vemelos*, fell to the bottom of the Number 1 hold suffering substantial injuries. The Deputy Commissioner determined from the

evidence presented at the hearing on the claim that the injury arose out of and in the course of the claimant's employment and awarded him compensation. Plaintiff, the insurance company whose policy protected the employer from such claims, sued in the district court to have the award of compensation set aside on the ground that the Deputy Commissioner's determination was not supported by substantial evidence. The district court granted summary judgment for the insurance company and vacated the award. We reverse.

The only issue presented on this appeal is whether the district court properly applied the substantial evidence rule in reviewing the determination of the Deputy Commissioner. The district court understood its role to be that defined by section 10(e) of the Administrative Procedure Act, 5 U. S. C. § 706(2)(E), which requires a reviewing court to:

> hold unlawful and set aside agency action, findings, and conclusions found to be— . . . unsupported by substantial evidence, . . . In making [such determination], the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

As the Supreme Court said in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 508 (1951), "[The standard of judicial review] is sufficiently described by saying that the findings [of the Deputy Commissioner] are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. . . ."

The record before the district court on this review was, in great measure, uncontradicted testimonial evidence. The claimant, Frank Grayson, was a longshoreman of ten years' experience employed by Federal Marine Terminals, Inc. to work on the day of his injury in a crew consisting of himself and seven other men which was to

unload the Number 2 cargo hold on the *M/V Kostantis Vemelos*. Grayson was hired for a crew at about 1:00 p.m., and he had been working the 'tween deck of the Number 2 hold for about two hours when he told his fellow crewmen that he had to go to the washroom. He stated at the hearing that the need to relieve himself was urgent. He testified that he did not remember what happened after that until he was discovered lying injured at the bottom of the Number 1 hold after the fall in which he suffered a fractured elbow, a dislocated wrist and a comminuted fracture of the femur. Upon being asked leading questions by the Deputy Commissioner (Grayson was not represented by counsel at the hearing, although the employer was), Grayson stated that he did remember starting to climb the ladder leading from the hold in which he was working to the deck above, although he remembered nothing beyond that point in time until after the fall. He could not recall if he had relieved himself before the fall.

The employer first called the foreman of Grayson's crew, Jerry Ross, to testify. He stated that on the day in question his crew was working in the Number 2 cargo hold. No one was working in the Number 1 cargo hold where Grayson was found. He further testified that the hatch cover over the Number 1 cargo hold was closed so that the hold was in complete darkness. There was no direct connection between the Number 1 and Number 2 cargo holds. To get from the Number 2 hold to the Number 1 hold necessitated climbing the ladder out of the Number 2 hold onto the main or upper deck, then walking approximately eight feet to the manhole and descending another ladder into the Number 1 hold. Ross examined the ship immediately following the accident. The ladder from the upper deck to the 'tween deck of each hold was approximately nine feet in height. The distance between

the foot of the ladder on the 'tween deck and the opening through which Grayson fell to the lower deck was approximately eight or ten feet at the closest point. Ross also testified that the washroom was in the men's dressing room on the dock, so that Grayson would have to leave the ship to use that facility. Finally, Ross stated that he did not think it was possible to go down the ladder into the complete darkness of Number 1 cargo hold without noticing that the hatch cover overhead was closed.

The employer next called Dessie Bond, another foreman at Federal Marine Terminals, to testify. On the afternoon in question, he was working on deck at the Number 4 hatch when he was told that someone had fallen into the hold. He watched while a mate uncovered the hatch over the Number 1 cargo hold. He saw Grayson lying on the lower deck of that hold. No one was assigned to work in the Number 1 hold on that particular day. Bond was later present when the hatch cover over the Number 1 hold was closed. He went down the ladder onto the 'tween deck which he said was "completely dark." He further stated that it was not possible to go directly down the ladder from the main deck to the lower deck where Grayson was found. The opening to the lower deck was approximately six to ten feet from the base of the ladder on the 'tween deck. Finally, he stated that it was not possible to mistake the completely dark Number 1 hold for the sunlit Number 2 hold. Nor was it possible to fall from the ladder between the main and 'tween decks directly into the lower hold.

The employer then called Jerry Horton, a marine surveyor who took the measurements of the Number 1 and 2 cargo holds on the same afternoon Grayson fell. He stated that a masthouse is located between the manholes into the Number 1 and 2 holds and that the manholes were approximately six feet apart. The ladder between the

main and 'tween decks of the Number 1 hold measured sixteen feet. The distance between the foot of the ladder on the 'tween deck and the opening into the lower hold was approximately ten feet.

Horton testified that he was in the Number 1 hold when the hatch cover was closed. He observed "complete darkness." He did not think it possible to fall from the manhole ladder into the lower hold. He further stated that there was not a washroom "in that particular area," and that the washroom on the dock was some 150 to 200 yards from the ship. He observed that the cargo in the forward section of the lower hold had been torn open, fully exposed, and *possibly* pilfered. However, he did not observe any of the cargo on Grayson's person when he was removed from the lower hold. He also stated that there was no cargo near where Grayson landed when he fell. He testified that cargo had been "worked at some point" prior to the vessel's arrival at Chicago.

Alfred Hudson, the terminal manager for Federal Marine Terminals, testified that he first became aware of the accident at approximately 3:15 p.m. He arrived at the dock just as Grayson was brought ashore. He then inspected the Number 1 hold. He testified that it was impossible to fall down directly from the manhole of the Number 1 hold into the lower hold because the 'tween deck adjoined the area surrounding the base of the ladder. Hudson was in the 'tween deck when the hatch cover over the Number 1 hold was replaced. He observed "total darkness." He also went down into the Number 2 hold where he observed daylight when he looked down into the manhole. He stated that although Number 1 and 2 manholes had similar exteriors, upon entry into each manhole a difference was immediately apparent since the Number 1 hold was completely dark while the Number 2 hold was light. He also testified that the washroom

facilities used by most of the men were located adjacent to their locker room facilities, although in an emergency shipboard facilities could be used. However, the men were not shown where these emergency washrooms were located.

The final witness for the employer was William Forrester, a photographer. He authenticated a number of photographs of the vessel which were admitted into evidence.

The Deputy Commissioner determined from the foregoing record that Grayson's injury was compensable under the Longshoremen's & Harbor Workers' Compensation Act as having arisen "out of and in the course of employment," since, as he specifically found, "The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred." Our inquiry must be directed to whether the record affords a substantial evidentiary basis for that determination.

We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability. Section 20(a) of the Act, 33 U. S. C. § 920(a), provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of *substantial* evidence to the contrary—(a) That the claim comes within the provisions of this chapter. (Emphasis added).

In *Del Vecchio* v. *Bowers*, 296 U. S. 280 (1935), the Supreme Court considered the effect of the similar presumption of 33 U. S. C. § 920(d) that death was not suicide. The Court stated that to defeat a claim, "The employer must rebut [the presumption of coverage] *prima facies*." *Id.* at 286. The Court further observed that if the evidence permitted an inference to be drawn either in favor of compensation or against it, "[T]he Deputy Commissioner

and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court." *Id.* at 287.

The Government urges, on behalf of the Deputy Commissioner, that the employer did not present a prima facie case to the Deputy Commissioner sufficient to justify a determination adverse to the claimant. Therefore, the argument proceeds, if the Deputy Commissioner had determined the claim in the opposite fashion on this record, we would be compelled by the presumption of section 920(a) to reverse in favor of the claimant as the District of Columbia Circuit did in *Wheatley v. Adler*, 407 F. 2d 307 (D. C. Cir. 1968). *Wheatley* was a case in which a covered employee suffered heart failure due to pre-existing, but undiscovered arteriosclerotic heart disease. He died as he returned from answering a call of nature in an outside yard at his place of employment in 40-degree weather. There was no evidence that employment-related physical exertion or emotional stress other than urinating in the cold had precipitated the heart failure. The Court of Appeals reversed the Deputy Commissioner's rejection of the claim for compensation on the ground that the record did not "contain substantial evidence to dispel the statutory presumption." *Id.* at 314.

However, we need not determine the result of the Government's hypothetical case of a rejected claim on this record. We are convinced that, at best, the employer's evidence was insufficient to preclude the Deputy Commissioner's determination that the injury was compensable. The only defense attempted by the employer was the introduction of evidence obviously intended to produce the inference that Grayson had deviated from the course of his employment and suffered injury while pilfering cargo. The evidence in that regard was so weak that,

in fact, there was no evidence that pilfering had occurred in the port of Chicago. In any event, the Deputy Commissioner determined, "The injury arose out of and in the course of employment. The employee had left his worksite aboard the vessel to look for a washroom when the injury occurred." That conclusion was obviously based upon Grayson's testimony that he left his worksite to answer an urgent call of nature and on a determination that the employer's evidence did not warrant a finding that Grayson had deviated from his employment.

Bearing in mind that judicial review of such determinations by the Deputy Commissioner is limited by the presumption of 33 U. S. C. § 920(a), *O'Keeffe* v. *Smith, Hinchman & Grylls Assoc.*, 380 U. S. 359, 361 (1965), we hold that the Deputy Commissioner's determination was neither "irrational" nor "unsupported by substantial evidence on the record . . . as a whole." *Id.* at 362.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent herewith.